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No. 81-126

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

MARSHALL FIELD & COMPANY,

Petitioner,

v.

GEORGENE PASKULY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

Whether an amended complaint adding class plaintiffs to an individual lawsuit after the expiration of the applicable statute of limitations relates back under Rule 15(c) of the Federal Rules of Civil Procedure to the date the original complaint was filed where the defendant had no notice within the limitations period of either the original individual complaint or the additional class plantiffs.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Marshall Field & Company ("Field")* prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered on April 28, 1981.

* Marshall Field & Company is a parent corporation. Its divisions and subsidiaries all are wholly owned.

OPINIONS BELOW

The opinion of the Court of Appeals (Appendix A, *infra*, pp. 1a-2a) is reported at 646 F.2d 1210 (7th Cir. 1981). The decision of the District Court (Appendix B, *infra*, pp. 3a-8a) is reported at 494 F.Supp. 687 (N.D. Ill. 1980).

JURISDICTION

The Judgment of the Court of Appeals was entered on April 28, 1981 (Appendix C, *infra*, p. 9a). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1). The jurisdiction of the Court of Appeals was conferred by 28 U.S.C. § 1292(b).

STATUTORY PROVISION AND RULE INVOLVED

Civil Rights Act of 1964, Title VII, 42 U.S.C. § 2000e-5(f)(1), provides in relevant part:

> .... If a charge filed with the Commission pursuant to subsection (b) of this section is dismissed by the Commission, or if within one hundred and eighty days from the filing of such charge or the expiration of any period of reference under subsection (c) or (d) of this section, whichever is later, the Commission has not filed a civil action under this section or the Attorney General has not filed a civil action in a case involving a government, governmental agency, or political subdivision, or the Commission has not entered into a conciliation agreement to which the person aggrieved is a party, the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge (A) by the person claiming to be aggrieved or (B) if such charge was filed by a member of the Commission, by any person whom the charge alleges was aggrieved by the alleged unlawful employment practice.

Rule 15(c) of the Federal Rules of Civil Procedure provides in relevant part:

> (c) Relation Back of Amendments. Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading. An amendment changing the party against whom a claim is asserted relates back if the foregoing provision is satisfied and, within the period provided by law for commencing the action against him, the party to be brought in by amendment (1) has received such notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits, and (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against him.

STATEMENT OF THE CASE

A. The Facts

On July 23, 1974, Georgene Paskuly ("Paskuly") filed a charge with the Equal Employment Opportunity Commission ("EEOC") alleging that she had been unlawfully discriminated against on the basis of her sex by her employer, Field. On April 5, 1978, Paskuly received a Notice of Right To Sue from the EEOC.

On June 23, 1978, Paskuly filed a Complaint with the District Court alleging that Field had unlawfully discriminated against her because of her sex in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq.* ("Title VII") (App. A, p. 1a; App. B, p. 3a). Field was served with Paskuly's Complaint on July 12, 1978, eight days after the expiration of the ninety-day Title VII statute of limitations.

On October 25, 1979, Paskuly filed an Amended Complaint seeking to transform this action into a class action on behalf of all similarly situated female employees of Field (App. A, p. 1a; App. B, p. 3a).

B. The Decision of the District Court

On November 14, 1979, Field moved to strike, *inter alia*, the class claims from the Amended Complaint on the grounds that such claims neither were made within the applicable Title VII ninety-day statute of limitations nor related back to the filing date of the original Complaint under Rule 15(c) of the Federal Rules of Civil Procedure for the reason that Field had no notice within the applicable limitations period of the addition of class plaintiffs (App. B, pp. 3a-4a).

On June 18, 1980, the District Court denied Field's Motion to Strike the class claims from the Amended Complaint (App. B, pp. 3a-8a). In so doing, the court acknowledged that the applicable ninety-day Title VII limitations period was jurisdictional and that the provisions of Rule 15(c) of the Federal Rules of Civil Procedure apply to amendments seeking to add plaintiffs (App. B, pp. 4a-5a). The District Court further stated that:

> As to Rule 15(c)'s additional notice considerations, the Court prefatorially notes that it is rare that an amendment will relate back which adds plaintiffs who are total strangers to the lawsuit. E.g., *Perry* v. *Beneficial Finance Co.*, 81 F.R.D. 490, 494 (W.D. N.Y. 1979); *Herm* v. *Stafford*, 455 F.Supp. 650 (W.D. Ky. 1978); 3 *Moore's Federal Practice*, ¶ 15.15 [4.-2]. However, the particular facts of this case coupled with the nature of the Title VII remedy causes the Court to carve out an exception to that general rule in the instant case.

(App. B, pp. 5a-6a).

The District Court went on to state that relation back should be allowed in this case because "[t]he policies underlying Title VII strongly favor the bringing of class actions" and that the primary question to be decided when determining whether a new plaintiff's claim should relate back to the date of the claim of the original plaintiff "is whether the defendant had such notice of the added claim at the time the action was commenced that relation back of the added claim will not cause defendant undue prejudice" (App. B, pp. 5a-6a). The court further reasoned that:

> . . . although once plaintiff initially commenced this action defendant was no longer on notice that it would have to defend itself in a class action, the allegations of the original complaint nevertheless apprised defendant that it would have to defend its employment practices from charges of broad-ranging class-based discrimination.

(App. B, p. 7a). The District Court also found that, because Paskuly's original individual Complaint challenged Field's policies "on the ground that they discriminate against plaintiff and other female employees," the evidence Field would use in its defense against the original individual Complaint and the Amended class Complaint would be "precisely the same" (App. B, p. 7a). Thus, the District Court determined that Field would not be prejudiced if the Amended Complaint's class claims related back to the date Paskuly's original Complaint was filed (App. B, p. 7a).

C. Section 1292(b) Certification

On June 27, 1980, the District Court, pursuant to 28 U.S.C. § 1292(b), certified that portion of its June 18, 1980 Memorandum Opinion denying Field's Motion to Strike the Amended Complaint's class claims (Appendix D, *infra*, p. 10a). On July 7, 1980, Field filed its Petition for Per-

mission to Appeal with the Seventh Circuit. On August 12, 1980, the Seventh Circuit granted Field permission to appeal (Appendix E, *infra*, pp. 11a-14a).

D. The Decision of the Court of Appeals

The Court of Appeals affirmed the decision of the District Court (App. A, pp. 1a-2a).[1] In so doing, the court determined that Paskuly's Amended Complaint related back to the date of the original pleading because the Amended Complaint alleges that the class claims arose from the same employment practices from which Paskuly's original claim arose (App. A, pp. 1a-2a). The court further stated:

> We note that the original complaint alleged that defendant engaged in practices that discriminated against women because of their sex; the defendant was thereby on notice that it might be required to defend its employment practices from charges of class-based discrimination. [Citations omitted] In view of this notice, we believe that the district court's finding that the defendant was not prejudiced by plaintiff's amendment was not clearly erroneous.

(App. A, p. 2a).

The Court of Appeals further concluded that the filing of Paskuly's EEOC charge also gave Field "notice of the likelihood of a class-wide action later being maintained against it" (App. A, p. 2a). Finally, the Court of Appeals, noting the broad-based nature of Paskuly's original Complaint, disagreed with the District Court's conclusion that the original Complaint, brought by Paskuly in her individual capacity, put Field off notice of the possibility of a class action (App. A, p. 2a).

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[1] The EEOC filed an *amicus curiae* brief in the Court of Appeals on behalf of Paskuly because the "appeal involve[d] an issue of importance to Title VII enforcement . . . ." Brief For The Equal Employment Opportunity Commission As *Amicus Curiae* at 1.

REASONS FOR GRANTING THE WRIT

A. The Decision Below Conflicts With Principles Of Law Established By This Court, Decisions Of Other Circuits And Earlier Decisions Of The Seventh Circuit And Ignores The Requirements Of The Applicable Federal Rule Of Civil Procedure.

The decision below permitted Paskuly's Amended Complaint, which added thousands of parties plaintiff to the lawsuit, to relate back to the date the original Complaint was filed even though Field had no notice of Paskuly's original Complaint and, consequently, no notice of any allegations by Paskuly, class-wide or otherwise, within the applicable limitations period. In allowing relation back under such circumstances, the decision below conflicts with principles of law established by this Court, decisions of other courts and earlier Seventh Circuit decisions. Similarly, it ignores the requirements for relation back mandated by Rule 15(c) of the Federal Rules of Civil Procedure.

The relation back concept embodied in Rule 15(c) is intimately tied to the policy underlying the statute of limitations principle.[2] *Patterson* v. *General Motors Corporation*, 631 F.2d 476, 486 (7th Cir. 1980). Indeed, "the chief consideration of [the] policy [underlying Rule 15(c)] is that of the statute of limitations." *Advisory Committee's Notes*, 39 F.R.D. 69, 84. In *American Pipe and Construction Co.* v. *Utah*, 414 U.S. 538, 555 (1974), this Court noted that the policy behind the statute of limitations is satisfied when a suit is commenced which "notifies the defendants not only of the substantive claims being brought against them, but

[2] Although Rule 15(c) specifically refers to the addition of parties defendant, it has uniformly been held by numerous courts, including the District Court below, that Rule 15(c) similarly applies "by analogy" to the addition of parties plaintiff. *Advisory Committee's Notes*, 39 F.R.D. 69, 83-4; Wright & Miller, *Federal Practice And Procedure*: Civil § 1501.

also of the number and generic identities of the potential plaintiffs who may participate in the judgment." This Court went on to state that the limitations policy was satisfied in the case before it because "[w]ithin the period set by the statute of limitations, the defendants have the essential information necessary to determine both the subject matter and size of the prospective litigation, whether the actual trial is conducted in the form of a class action, as a joint suit, or as a principal suit with additional intervenors" (*Id.*).

Field was not served with the Amended Complaint in which Paskuly sought to represent a class within the applicable limitations period and, therefore, had no timely notice of the class claims. In fact, because Field was not served with the original Complaint prior to the expiration of the statute of limitations, Field had *no notice* whatsoever of this lawsuit within the limitations period. It necessarily follows that within the statutory period Field had no notice of "the number and generic identities of the potential plaintiffs," "the subject matter and size of the prospective litigation" or that this suit was brought as a "class action." Accordingly, the decision below, by permitting relation back, conflicts with the rule established by this Court in *American Pipe and Construction Co.* v. *Utah, supra.*

The decision below also conflicts with the decision of the Second Circuit in *Arneil* v. *Ramsey,* 550 F.2d 774 (2d Cir. 1977). In that case the Second Circuit held that an amended complaint which broadened the parameters of the proposed class did not relate back to the date of the original complaint. In so doing, the court stated that:

> Relation back, at least on the facts of this case, would not accord with one of the rationales of *American Pipe* [*and Construction Co.* v. *Utah,* 414 U.S. 538], that commencement of the class action adequately notifies the defendants "not only of the substantive claims being brought against them, but also of the number and

> generic identities of the potential plaintiffs who may participate in the judgment. Within the period set by the statute of limitations, the defendants have the essential information necessary to determine both the subject matter and size of the prospective litigation • • • ." 414 U.S. at 545-555, 94 S.Ct. at 767.

550 F.2d at 782.

Accordingly, by not permitting relation back of the amended complaint, the Second Circuit in *Arneil* reached the opposite conclusion from that reflected in the decision of the court below. This is made clear by the decision in *Perry* v. *Beneficial Finance Co. of New York, Inc.*, 81 F.R.D. 490 (W.D.N.Y. 1979), in which the court was faced with the precise issue here and, guided by *Arneil*, refused to permit an amended complaint adding a class action allegation to relate back to the date the original complaint was filed.

Moreover, contrary to numerous decisions of other circuits and, indeed, contrary to earlier Seventh Circuit precedent, the court below did not require fulfillment of all the prerequisites mandated by Rule 15(c) of the Federal Rules of Civil Procedure before permitting the Amended Complaint adding parties to relate back to the date the original Complaint was filed. Prior to the decision below, the Seventh Circuit had consistently applied all the Rule 15(c) prerequisites when resolving issues arising under that Rule. *Norton* v. *International Harvester Company*, 627 F.2d 18 (7th Cir. 1980); *McGowan* v. *Williams*, 623 F.2d 1239 (7th Cir. 1980); *Wood* v. *Worachek*, 618 F.2d 1225 (7th Cir. 1980); *Sassi* v. *Breier*, 584 F.2d 234 (7th Cir. 1978); *Staren* v. *American National Bank and Trust Company of Chicago*, 529 F.2d 1257 (7th Cir. 1976); *Simmons* v. *Fenton*, 480 F.2d 133 (7th Cir. 1973). It is also well-established law in other circuits that all the criteria of Rule 15(c) must be satisfied where a new party is brought into

a lawsuit. *Hernandez Jimenez* v. *Calero Toledo*, 604 F.2d 99 (1st Cir. 1979); *Ingram* v. *Kumar*, 585 F.2d 566 (2d Cir. 1978), *cert. denied*, 440 U.S. 940 (1979); *Britt* v. *Arvantis*, 590 F.2d 57 (3d Cir. 1978); *Montalvo* v. *Tower Life Building*, 426 F.2d 1135 (5th Cir. 1970); *Gridley* v. *Cunningham*, 550 F.2d 551 (8th Cir. 1977); *Craig* v. *United States*, 413 F.2d 854 (9th Cir.), *cert. denied*, 396 U.S. 987 (1969); *Archuleta* v. *Duffy's, Inc.*, 471 F.2d 33 (10th Cir. 1973).

In its failure to require that all of the Rule 15(c) criteria be satisfied, the decision below ignored completely the "mistake" requirement of that Rule; Paskuly neither argued, nor did the court below find, that the Rule 15(c) "mistake" prerequisite had been met.

Similarly, the court below ignored the clear wording of the Rule 15(c) notice requirement which demands "notice of the institution of the action" within the limitations period. Instead, the appellate court held that Field received adequate notice because Paskuly's broad claims in her original complaint put Field "on notice that it might be required to defend its employment practices from charges of class-based discrimination" and because Paskuly's EEOC charge gave Field "notice of the likelihood of a class-wide action later being maintained against it." In so holding, the decision below squarely conflicts with the decision of the Tenth Circuit in *Archuleta* v. *Duffy's, Inc.*, 471 F.2d 33 (1973), and the Ninth Circuit in *Craig* v. *United States*, 413 F.2d 854, *cert. denied*, 396 U.S. 987 (1969), both of which held that knowledge of the existence of a *potential* action does not constitute "notice of the institution of an action" as required by Rule 15(c). Similarly, it contradicts a prior Seventh Circuit decision in *Norton* v. *International Harvester Company, supra*, which held that notice of an incident

giving rise to a lawsuit but not of the lawsuit itself falls short of satisfying the Rule 15(c) prerequisites.[3]

Accordingly, certiorari should be granted because the decision of the court below represents a gross departure from well-established principles of law espoused by this Court and numerous lower courts and reflected in the applicable Federal Rule of Civil Procedure. Additionally, the grant of certiorari is appropriate here to resolve extremely significant conflicts between the circuits as well as between different panels of the Seventh Circuit.

B. This Case Presents Questions Of Substantial And Recurring Importance And Therefore Is Appropriate For Decision By This Court.

This case presents a crucial and far-reaching question: may a defendant, long after the expiration of the applicable limitations period and without any prior timely notice, be required to defend itself against the claims of thousands of new plaintiffs with the concomitant increased potential liability and other attendant burdens associated with class as compared with individual litigation? An affirmative response to that question, as given by the court below, represents a substantial departure from the long-standing funda-

[3] Inexplicably, the court below applied a test of *de novo* review in reversing the District Court's holding that Field had no notice of a class action within the limitations period but applied a different test, the clearly erroneous test, in affirming the District Court's conclusion that Field had not been prejudiced. In contrast, in *Norton*, the Seventh Circuit held that loss of the statute of limitations defense was *prima facie* prejudice as a matter of law which could be overcome only by showing notice, which presumably is a question of fact. Thus, the court below is inconsistent with *Norton* since it reverses the standards of review applied in *Norton* to questions of prejudice and notice.

mental legal policy underlying the very concept of the statute of limitations—a policy mandating that, within the applicable limitations period, a defendant must be notified not only of the substantive claims brought against it "but also of the number and generic identities of the potential plaintiffs who may participate in the judgment" and whether a "class action" is involved. *American Pipe and Construction Co.* v. *Utah, supra.*

The factual circumstances of this case are hardly unique. Indeed, they present a recurring situation, especially in Title VII lawsuits. Often, after the expiration of the ninety-day limitations period, a Title VII plaintiff seeks to transform his or her lawsuit into a class action. A defendant in such a situation, if the amendment adding class claims is permitted, is faced with a new cause of action with potentially thousands of new plaintiffs long after the expiration of the limitations period.

Further, the position of the Seventh Circuit espoused in this case would emasculate the enforcement scheme mandated by Congress for Title VII—a scheme clearly designed for expeditious enforcement of the Act—by effectively rendering null and void Title VII's ninety-day statutory limitations period.

The significance and, indeed, the far-reaching impact of the issue presented for review has already been attested to by the EEOC, which appeared as *amicus curiae* on behalf of Paskuly in the court below, and which expressly noted that this case "involves an important question concerning the ability of Title VII litigants to amend their timely filed complaints to include class allegations more than 90 days after issuance of a right to sue notice." Motion By

The Equal Employment Opportunity Commission, *Amicus Curiae*, For Leave To Present Oral Argument at 2.

Clearly, the issues sought to be brought before this Court are of substantial and recurring importance necessitating final resolution in this judicial forum.

CONCLUSION

For these reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

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July, 1981

APPENDIX

APPENDIX A

Georgene PASKULY, Plaintiff-Appellee,

v.

MARSHALL FIELD & COMPANY,
Defendant-Appellant.

No. 80-2207

United States Court of Appeals,
Seventh Circuit.

Argued Jan. 9, 1981.

Decided April 28, 1981.

Before PELL and WOOD, Circuit Judges, and BONSAL, Senior District Judge.*

PER CURIAM.

Plaintiff Georgene Paskuly instituted this action on June 23, 1978 in the United States District Court for the Northern District of Illinois, Eastern Division. The complaint alleged that her employer, defendant Marshall Field & Company, had discriminated against her because of her sex. On October 25, 1979 plaintiff filed an amended complaint seeking to transform her action into a class action on behalf of all similarly situated female employees of the defendant. Defendant moved to strike plaintiff's class allegations on the ground that the plaintiff failed to assert them within 90 days of her receipt of her right-to-sue letter from the Equal Employment Opportunity Commission ("EEOC"). The district court denied defendant's motion, and it appeals.

We affirm.

In her amended complaint, plaintiff alleges that the claims of the class arose from the same employment prac-

* Senior District Judge Dudley B. Bonsal of the Southern District of New York is sitting by designation.

tices from which her individual claim arose. The amended pleading therefore "relates back" to the date of the original pleading under Rule 15(c) of the Federal Rules of Civil Procedure, which preserves the amended complaint from operation of the 90-day limitations period of Title VII, 42 U.S.C. § 2000e—5(f). *Bernstein* v. *National Liberty International Corp.*, 407 F.Supp. 709 (E.D.Pa. 1977); *see also Badillo* v. *Central Steel & Wire Co.*, 495 F.Supp. 299 (N.D.Ill.1980); *Harshaw* v. *Pan American World Airlines*, 70 F.R.D. 462 (D.D.C. 1975); *Silverman* v. *Lehigh University*, 19 FEP Cases 983 (E.D.Pa.1976). We note that the original complaint alleged that defendant engaged in practices that discriminated against women because of their sex; the defendant was thereby on notice that it might be required to defend its employment practices from charges of class-based discrimination. *See Staren* v. *American National Bank & Trust Company of Chicago*, 529 F.2d 1257 (7th Cir. 1976); *Unilever (Raw Materials) Ltd.* v. *M/T Stolt Boel*, 77 F.R.D. 384 (S.D.N.Y. 1977). In view of this notice, we believe that the district court's finding that the defendant was not prejudiced by plaintiff's amendment was not clearly erroneous.

Moreover, the filing of the EEOC charge also placed defendant on notice of the likelihood of a class-wide action later being maintained against it. In view of the broad-based nature of the original complaint, we therefore cannot agree with the district court that defendant was "'put-off' notice" of the possibility of a class action when plaintiff instituted this action in an individual capacity. *See Romasanta* v. *United Airlines, Inc.*, 537 F.2d 915, 918 n.6, *aff'd sub nom. United Airlines, Inc.* v. *McDonald*, 432 U.S., 385, 97 S.Ct. 2464, 52 L.Ed.2d 423 (1977).

We note that the district court has not passed on plaintiff's request for class certification, pursuant to Fed.R. Civ.P. 23.

The judgment of the district court is affirmed.

APPENDIX B

Georgene PASKULY, Plaintiff,

v.

MARSHALL FIELD & COMPANY, Defendant.

No. 78 C 2528.

United States District Court, N. D. Illinois, E. D.

June 18, 1980.

MEMORANDUM OPINION

MAROVITZ, District Judge.

Motion To Strike And Dismiss

Plaintiff Georgene Paskuly brings this action against her employer, defendant Marshall Field & Company, alleging that defendant has discriminated against her because of her sex. Plaintiff originally commenced this action in an individual capacity on June 23, 1978. On October 25, 1979, plaintiff filed her amended complaint seeking to transform this action into a class action on behalf of all similarly situated female employees of defendant. Plaintiff's amended complaint alleges, *inter alia*, that defendant's employment practices with respect to job assignments, wages, training, promotion, transfer, discharge, and layoff discriminate against women employees. Plaintiff asserts claims under 42 U.S.C. § 2000e (Title VII) and 42 U.S.C. § 1981. Plaintiff seeks declaratory, injunctive, and monetary relief. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1343.

Pending before the Court is defendant's motion to strike certain portions of plaintiff's amended complaint. More

specifically, defendant requests the Court to strike plaintiff's class allegations, her section 1981 claim, her claim based upon defendant's alleged failure to adopt an affirmative action program with respect to women, and her claim as to defendant's alleged wrongful layoff and discharge practices. For the reasons set forth below, the Court denies defendant's motion insofar as it seeks to have stricken plaintiff's class allegations and grants defendant's motion as to plaintiff's section 1981 claim. Because plaintiff has yet to have an opportunity to respond to defendant's other arguments, the Court does not today reach those arguments.

The Court turns first to the class action issue. Defendant argues that because plaintiff failed to make her class allegations within 90 days of her receipt of her right to sue letter from the Equal Employment Opportunity Commission (EEOC), plaintiff's class allegations are untimely. Further, defendant argues that the class allegations of plaintiff's amended complaint should not relate back, pursuant to Rule 15(c) of the Federal Rules of Civil Procedure, to the time plaintiff filed her original complaint.

The relevant time limitations with respect to the assertion of a claim under Title VII require that a claimant must file his claim with the EEOC within 180 days of the alleged discrimination and that the claimant's civil action must be brought within 90 days of his receipt from the EEOC of a right to sue letter. 42 U.S.C. §§ 2000e-5(a), (e). These time limitations are characterized as jurisdictional, *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 798, 93 S.Ct. 1817, 1822, 36 L.Ed.2d 668 (1973); however, they are intended to serve the same purpose as a statute of limitation. *See Bowe* v. *Colgate-Palmolive Co.*, 416 F.2d 711, 720 (7th Cir. 1969). Specifically, Title VII's time limitations are designed to grant employers notice of any alleged violations before relevant evidence becomes stale. *E.g., id.*

Rule 15(c) contains a general requirement that amendments to pleadings will relate back to the date of the original filing only when the claim asserted in the amended pleading arises out of the same set of facts as did the original claim. Further, Rule 15(c) establishes certain additional requirements pertaining to notice which must be met before an amendment changing or adding defendants will relate back. Fed.R. Civ.P. 15(c). Although Rule 15(c) does not explicitly address the relation back questions which arise when an amendment substitutes or adds plaintiffs, it is clear that the considerations established in the rule were intended to apply to such amendments. Adv.Comm.Note, *reprinted in* 39 F.R.D. 69, 84. The central underlying question which a court must decide when determining whether a claim asserted by a new plaintiff shall relate back to the time of the original plaintiff's claim is whether the defendant had such notice of the added claim at the time the action was commenced that relation back of the added claim will not cause defendant undue prejudice. *See Staren* v. *American National Bank & Trust Company of Chicago,* 529 F.2d 1257, 1263 (7th Cir. 1976); *Unilever (Raw Materials) Ltd.* v. *M/T Stolt Boel,* 77 F.R.D. 384, 390 (S.D.N.Y. 1977). In so doing, the Court should remain mindful that the federal rules are to be accorded a liberal interpretation. *Staren* v. *American National Bank & Trust Company of Chicago,* 529 F.2d 1257, 1263 (7th Cir. 1976).

In the instant case, since the claims of the class which plaintiff seeks to bring into this action are alleged to arise from the same employment practices from which plaintiff's claim allegedly arises, the Court finds that the amendment adding the class claims satisfies the common factual requirement of Rule 15(c). *See Romasanta* v. *United Airlines, Inc.,* 537 F.2d 915, 919 (7th Cir. 1976), *aff'd United Airlines, Inc.* v. *McDonald,* 432 U.S. 385, 97 S.Ct. 2464, 52 L.Ed2d 423 (1977). As to Rule 15(c)'s additional notice

considerations, the Court prefatorially notes that it is rare that an amendment will relate back which adds plaintiffs who are total strangers to the lawsuit. *E.g., Perry* v. *Beneficial Finance Co.*, 81 F.R.D. 490, 494 (W.D.N.Y. 1979); *Herm* v. *Stafford*, 455 F.Supp. 650 (W.D.Ky. 1978); 3 *Moore's Federal Practice*, ¶ 15.-15[4.-2]. However, the particular facts of this case coupled with the nature of the Title VII remedy causes the Court to carve out an exception to that general rule in the instant case.

The policies underlying Title VII strongly favor the bringing of class actions. *Bowe* v. *Colgate-Palmolive Co.*, 416 F.2d at 719; *Oatis* v. *Crown Zellerbach Corp.*, 398 F.2d 496, 498 (5th Cir. 1968). Title VII is primarily designed to eradicate discrimination of a class-wide character, and the Courts have recognized that this goal may often be best achieved by way of a class action. *Bowe* v. *Colgate-Palmolive Co.*, 416 F.2d at 719. In this connection, Title VII is also designed to facilitate equal treatment among the class members. *Romansanta* v. *United Airlines, Inc.*, 537 F.2d at 918. Therefore, the courts have adopted a rule which provides that once a single Title VII class member has timely filed charges with the EEOC, he may subsequently bring a class action without the other members of the class having instituted a grievance with the EEOC. *Bowe* v. *Colgate-Palmolive Co.*, 416 F.2d at 720. Moreover, this Circuit has held that an EEOC filing by a single class member grants the adverse party sufficient notice of the possibility of a class action that the statute of limitation for the entire class is thereby tolled. *Romansanta* v. *United Airlines, Inc.*, 537 F.2d at 918 n. 6. The rationale for the rule is that when an individual lodges an EEOC claim which asserts a grievance common to the class to which he belongs, the adverse party can not fairly complain of surprise when a class action is subsequently instituted. *Bowe* v. *Colgate-Palmolive Co.*, 416 F.2d at 720. The problem presented herein is while

defendant was fairly put on notice of the possibility of a class-wide action when plaintiff filed her charges with the EEOC, defendant was "put off" notice of the possibility of such an action when plaintiff instituted this action in an individual capacity.

As stated above, however, the facts of this case coupled with the important policies of Title VII lead this Court to the conclusion that plaintiff's class claims should relate back to the time of the filing of her original complaint. *See Mays* v. *Motorola, Inc.*, 14 EPD ¶ 7676 (N.D.Ill. 1977). First, the Court notes that defendant has not convincingly asserted any specific prejudice which it will suffer if the Court permits plaintiff's class claims to relate back. Further, although once plaintiff initially commenced this action defendant was no longer on notice that it would have to defend itself in a class action, the allegations of the original complaint nevertheless apprised defendant that it would have to defend its employment practices from charges of broad-ranging class-based discrimination. The primary purpose of statutes of limitation is to protect parties from the prejudice caused by the loss of evidence due to the passage of time. *E.g., United States* v. *Kubrick*, 444 U.S. 111, 117, 100 S.Ct. 352, 357, 62 L.Ed.2d 259, 48 U.S.L.W. 4030, 4032 (1979). Plaintiff's original complaint challenges defendant's transfer, promotion, wage, job assignments, and training policies on the ground that they discriminate against plaintiff and other female employees of defendant. Hence, it can not reasonably be said that defendant would be prejudiced by the relation back of plaintiff's class allegations since precisely the same evidence which defendant would be required to marshall in its defense of plaintiff's class claims, defendant should have been preserving in order to defend itself against plaintiff's individual claim.

Moreover, it is likely that the relation back of plaintiff's class allegations will only slightly affect the size of the

putative class. Plaintiff alleges that defendant's discriminatory practices are of a continuing nature. Therefore, as a result of the relation back of plaintiff's class allegations the size of the putative class will only swell by the number of class members who left defendant's employ during the period from the date of plaintiff's EEOC filing until 180 days prior to the entry of this order. It is only as to this group that relation back will cause Title VII's time-bar to be lifted. Any Title VII claim of those females currently employed with defendant or who have left defendant's employ within the last 180 days remains viable irrespective of the Court's ruling today. Finally, the Court notes that discovery has been stayed in this action since early 1979. Indeed, to date there has been little discovery in this action. Therefore, the transformation of this action to a class action will not cause this action to be unduly delayed. *Cf. King* v. *Motor Freight Express, Inc.*, No. 78 C 4133 (N.D.Ill., March 18, 1980) (memorandum opinion denying leave to amend Title VII action to assert class claims because individual action was ripe for trial).

Accordingly, the Court hereby denies defendant's motion insofar as it seeks to have stricken plaintiff's class allegations. Of course, however, the Court in no way intimates any opinion as to the merits of plaintiff's request for class certification. Briefing of that motion shall proceed pursuant to Local Rule 13 as of the date of this memorandum opinion.

With respect to plaintiff's claim under 42 U.S.C. § 1981, defendant correctly points out, and plaintiff now concedes, Plaintiff's Sur-Reply Brief p. 3 n. 1, that that section may not be invoked to remedy sex discrimination. *E.g., Manzanares* v. *Safeway Stores, Inc.*, 593 F.2d 968, 971 (10th Cir. 1979). Accordingly, plaintiff's section 1981 claim is hereby stricken from her amended complaint. As to defendant's contentions with respect to plaintiff's layoff, discharge, and affirmative action claims, the Court hereby orders plaintiff to file her response brief and defendant its reply brief pursuant to Local Rule 13.

APPENDIX C

Per Curiam Opinion

JUDGMENT—ORAL ARGUMENT

United States Court of Appeals

FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604

April 28, 1981

Before

Hon. WILBUR F. PELL, JR., Circuit Judge
Hon. HARLINGTON WOOD, JR., Circuit Judge
Hon. DUDLEY B. BONSAL, Senior District Judge*

GEORGENE PASKULY, *Plaintiff-Appellee,* **No. 80-2207** vs. **MARSHALL FIELD & COMPANY,** *Defendant-Appellant.*	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division No. 78-C-2528 ABRAHAM L. MAROVITZ, Judge

This cause was heard on the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby AFFIRMED, with costs, in accordance with the opinion of this Court filed this date.

* Senior District Judge Dudley B. Bonsal of the Southern District of New York, sitting by designation.

APPENDIX D

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Honorable Abraham Lincoln Marovitz

Cause No. 78 C 2528 June 26, 1980

Title of Cause: Georgene Paskuly v. Marshall Field & Company.

Brief Statement of Motion: Motion to Amend Order to Include Section 1292(b) Certification and To Stay All District Court Proceedings.

* * *

Motion of the defendant to Amend Order to include Section 1292(b) Certification And to stay all District Court proceedings, is granted and all discovery is stayed. Cause is continued to September 10, 1980 at 10:45 A.M.

Docketed June 27, 1980

APPENDIX E

United States Court of Appeals

FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604

August 12, 1980

Before

Hon. WALTER J. CUMMINGS, Circuit Judge
Hon. WILBUR F. PELL, JR., Circuit Judge
Hon. WILLIAM J. BAUER, Circuit Judge

GEORGENE PASKULY,
Plaintiff-Appellee,

Misc. No. 80-8035 vs.

MARSHALL FIELD & COMPANY,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 78-C-2528
Joel M. Flaum, Judge

This matter comes before the Court for its consideration on the filing of the following documents:

1. "PETITION FOR PERMISSION TO APPEAL" filed herein on July 11, 1980 by counsel for the defendant-appellant.

2. "MEMORANDUM IN OPPOSITION TO DEFENDANT'S PETITION FOR PERMISSION TO APPEAL" filed herein on July 28, 1980 by counsel for the plaintiff-appellee.

3. "MOTION FOR LEAVE TO FILE INSTANTER REPLY MEMORANDUM IN SUPPORT OF PETITION FOR PERMISSION TO APPEAL" filed herein on July 31, 1980 by counsel for the defendant-appellant.

On consideration whereof,

IT IS ORDERED that defendant-appellant's petition for permission to appeal is hereby GRANTED.

PELL, dissenting.

There are very few cases of any complexity in the federal courts which do not from the outset involve rulings by the trial judges which, if set aside, would not change to some extent the course and length of the litigation. If these constantly recurring rulings are the subject of appellate interlocutory review simply because of a certification under 28 U.S.C. § 1292(b), the courts of appeals are more and more going to become involved in the piecemeal review of ongoing litigation in the trial courts with less and less available time to address those appeals with which the courts of appeals should be primarily concerned, being from final judgments. The present case is one which, in my opinion, presents no appropriate basis for review. Accordingly, I respectfully dissent.

At the outset, it must be noted, that the litigation below has not even reached the state of a class having been certified. If the case were allowed to proceed at the trial court level without appellate interference, the issue now before us could well be mooted by a determination of the impropriety of certification. Even if that next step had already occurred, and some type of class had been certified, the Supreme Court has made clear the inappropriateness of the review of such a question. *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463 (1978).

Aside from the fact that the time now spent by this court in reviewing the decision of the district court permitting the filing of an amended complaint may be an exercise in futility, the record presented to us simply does not demonstrate that the appellant has met the heavy burden facing a litigant who asks for the section 1292(b) interlocutory review.

This court has emphasized that the appellant "has the burden of persuading the court of appeals that exceptional circumstances justify a departure from the basic policy of postponing appellate review until after the entry of a final judgment." *Fisons Ltd.* v. *United States*, 458 F.2d 1241, 1248 (7th Cir. 1972). This language has been explicitly endorsed and adopted by the Supreme Court. *Coopers & Lybrand, supra*, at 475.

Turning to the presence of exceptional circumstances, I find none worthy of the designation. The plaintiff's original complaint was a class action complaint except for articulating the requirements of Rule 23 and adding a request for class relief. Thoughts of form over substances interject themselves. The original complaint explicitly and repeatedly alleged that the defendant maintained policies and practices that discriminated against women, not just against the named plaintiff. I fail to see in this reading of the amended complaint any basis for the appellant's assertion that the scope of discovery or the length of the trial will be changed by the amendment.

The appellant argues that this court in *Wenning* v. *Jim Walters Homes*, 606 F.2d 784, 785 (7th Cir. 1979), "has already stated that it is preferable to resolve a limitations issue before the class issue. . . ." The exact language of that case was: "Under these circumstances it was not error to reach the statute of limitations issue before deciding the class action." *Id.* at 785. *Wenning* involved an appeal from a final judgment and I have great difficulty in saying that a holding that the trial court's action was "not error" should be characterized as a "preference."

I agree with the appellee and with the trial court that the "Title VII claim of those females currently employed with defendant or who have left defendant's employ within the last 180 days remains viable irrespective" of the court's

ruling under review. Thus, the only real issue concerns a very small sub-group of the putative class who would need to rely on the relation-back doctrine to protect their claims. I have no reason for thinking that if the district court was incorrect in this relatively inconsequential portion of the order that it might not be corrected in the event an appropriate class would be certified.

I think if we continue to engage in piecemeal litigation on the basis of cases such as this one, we can only complain of an overload of cases with poor grace.

Office-Supreme Court, U.S.
FILED
SEP 4 1981
ALEXANDER L. STEVAS,
CLERK

No. 81-126

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

MARSHALL FIELD & COMPANY,

Petitioner,

vs.

GEORGENE PASKULY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF OF RESPONDENT IN OPPOSITION

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

MARSHALL FIELD & COMPANY,

Petitioner,

vs.

GEORGENE PASKULY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF OF RESPONDENT IN OPPOSITION

Petitioner Marshall Field & Company (Field) asks this Court to reconsider a decision of the Seventh Circuit which held that the plaintiff in a Title VII lawsuit could amend her timely complaint to include a class allegation more than ninety days after receipt of a right-to-sue letter from the Equal Employment Opportunity Commission. In a *per curiam* opinion, the Seventh Circuit held that since the claims of the class arose from the same employment practices from which her individual claim arose, the "amended pleading . . . 'relates back' to the date of the original pleading under Rule 15(c) of the Federal Rules of Civil Procedure . . ." (Appendix 2a). That decision squares with the existing case law and is mandated by Rule 15(c). Before discussing the factors which make *certiorari* inappropriate, it is necessary to set forth certain facts overlooked by petitioner.

STATEMENT OF THE CASE

Ms. Georgene Paskuly filed a Title VII lawsuit on June 23, 1978 (A-9),[1] well within the ninety day filing period. In all but form, the initial complaint was a class complaint. Although plaintiff did not plead the formal requirements of Rule 23, F. R. Civ. P., and did not explicitly request class-wide relief, her first complaint repeatedly alleged patterns and practices of discrimination that adversely affected women as a class. For example, Paragraph 10 of her original complaint states (A-11, 12):

> Defendant has established a promotional and transfer system which has the effect of continuing and preserving the *defendant's policy, practice, custom and usage of limiting the employment and promotional opportunities of female employees because of their sex.* These discriminatory practices include, but are not limited to, the following:
>
> A. Maintaining job classifications segregated on the basis of sex;
>
> B. Failing and refusing to transfer and promote plaintiff *and other qualified female employees* because of their sex;
>
> C. Maintaining policies and practices with respect, but not limited to, wages, job assignments and other terms and conditions of employment which unlawfully operate to deny equal opportunities to plaintiff *and other females* because of their sex;
>
> D. Maintaining policies and practices which utilize subjective, non-job related promotional and transfer criteria, which criteria operate and disparate and adversely affect plaintiff *and other females* because of their sex;
>
> E. Failing and refusing to pay plaintiff *and other females* on an equal basis with men for substantially equal work;

---

[1] Factual references are to the Appendix filed with the Seventh Circuit or to the record.

> F. Failing and refusing to provide training for plaintiff *and other females* because of their sex for positions for which sex is not a bona fide occupational qualification;
>
> G. Failing and refusing to take affirmative action to correct the effects of discriminatory policies and practices complained of herein. (Emphasis added.)

Paragraph 11 reiterates the class-wide scope of plaintiff's claims (A-12):

> The effect of the policies and practices complained of in paragraph ten (10) above, has been to deprive plaintiff *and other females* of equal employment opportunities and otherwise adversely to affect *their* status as employees because of *their* sex. (Emphasis added.)

Four months later, plaintiff's lawyer initiated a typical first wave of discovery (R-12) which was answered in January, 1979 (R-18). Shortly thereafter, plaintiff's counsel withdrew and discovery was stayed.

In the summer of 1979, new counsel was retained. After reviewing the EEOC charge, the pleadings and the initial discovery, plaintiff's new counsel sought and received permission to file an amended complaint and a motion for class certification. In October, 1979, plaintiff filed her Amended Complaint (A-17). The Amended Complaint set forth the identical substantive allegations. It differed from its predecessor in only two respects: it pleaded the requirements of Rule 23 and it added a request for class relief.

REASONS FOR DENYING THE WRIT

A.

The Decision Below Is Consistent With All Existing Title VII Case Law.

As petitioner correctly observes, "[t]he factual circumstances of the case are hardly unique. Indeed, they present a recurring situation, especially in Title VII lawsuits. Often, after

expiration of the ninety day limitations period, a Title VII plaintiff seeks to transform his or her lawsuit into a class action" (Petition, 12). What petitioner does not disclose is that the courts have routinely allowed plaintiffs in Title VII lawsuits to amend their complaints and add class allegations after the expiration of the ninety day filing period. See, *e. g., Badillo* v. *Central Steel & Wire Co.*, 495 F. Supp. 299 (N.D. Ill. 1980); *Rajender* v. *University of Minnesota*, 20 EPD ¶ 30,214 at 12,151 (D.Minn. 1978); *Bernstein* v. *National Liberty International Corp.*, 407 F. Supp. 207, 714 (E.D.Pa. 1976); *Silverman* v. *Lehigh University*, 19 FEP Cases 983, 984-85 (E.D.Pa. 1976); *Mays* v. *Motorola*, 12 EPD ¶ 11,027 (N.D. Ill. 1976); 14 EPD ¶ 7676 (N.D. Ill. 1977); *Harshaw* v. *Pan American World Airlines*, 12 FEP Cases 1353 (D.D.C. 1975).[2] To date, petitioner has failed to cite a single Title VII opinion reaching a contrary result.

B.

The Seventh Circuit Properly Applied Rule 15(c), Federal Rules of Civil Procedure.

The Seventh Circuit held that plaintiff's amended complaint adding a class allegation related back to the date of the original pleading under Rule 15(c)[3] because "the claims of the class arose from the same employment practices" set forth in the original pleading.

---

[2] Also, in *Nance* v. *Union Carbide Corp.*, 540 F.2d 719, 725 (4th Cir. 1976), the Court reversed an award of class relief because the plaintiff had failed to amend the complaint to add class allegations either before or during trial. It logically follows that the Fourth Circuit thought that these plaintiffs could have amended their Title VII lawsuit long after the ninety day filing period expired.

[3] Rule 15(c) reads:

Relation Back of Amendments. Whenever the claim or defense

(footnote continued on following page)

In challenging that ruling, petitioner contends that the Seventh Circuit improperly applied the "relation back" doctrine of Rule 15(c) of the Federal Rules of Civil Procedure. According to petitioner, Rule 15(c) mandates the fulfillment of three prerequisites before an amendment adding a class allegation can relate back to the date of the initial filing, namely:

> (a) that the claims alleged in the amended complaint arose out of the same occurrence set forth in the original pleadings;
>
> (b) that within the period provided by law for commencing the action, the defendant must receive such notice of the institution of the action that he will suffer no prejudice in defending on the merits; and
>
> (c) that within the period provided by law for commencing the action, the defendant knew or should have known that, but for a mistake concerning the identity of the proper parties, those parties would have been named in the original complaint.

Petitioner argues that the Seventh Circuit "ignored completely the 'mistake' requirement" and the requirement that it receive " 'Notice of the institution of the acts' within the limitation period" (Petition, 10). The error in petitioner's analysis is that

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(footnote continued from previous page)

> asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading. An amendment changing the party against whom a claim is asserted relates back if the foregoing provision is satisfied and, within the period provided by law for commencing the action against him, the party to be brought in by amendment (1) has received such notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits, and (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against him.

the latter two prerequisites do not apply to amendments to add plaintiffs to a pending lawsuit.

The test for determining whether an amendment that adds a class allegation or a new plaintiff after the statute of limitations has run should relate back under Rule 15(c) is the one applied by the Seventh Circuit, namely, does the underlying "claim. . . . arise out of the conduct, transaction or occurrence set forth or attempted to be set forth in the original pleading." The standard for applying the rule is that "amendments pursuant to Rule 15(c) should be freely allowed." *Staren* v. *American National Bank and Trust Company of Chicago*, 529 F.2d 1257, 1263 (7th Cir. 1976). The touchstone is notice because statutes of limitations are designed to protect parties from unfair surprises through the revival of stale claims after evidence has been lost, memories have faded or witnesses have disappeared. *Order of Railroad Telegraphers* v. *Railway Express Agency*, 321 U. S. 342, 348-49 (1944). Thus a party who has notice of litigation concerning a given transaction or occurrence and is preparing to defend the action against him has been extended all of the protection statutes of limitations afford.[4]

---

[4] Petitioner contends that notice of the substantive claims is not sufficient notice within the meaning of Rule 15(c). Instead, petitioner argues that it is also entitled to notice of the number and generic identity of all potential plaintiffs. It claims to find support for its position in this Court's decision in *American Pipe and Construction Co.* v. *Utah*, 414 U. S. 538 (1974).

There are two answers to petitioner's claim. First, petitioner's reliance on *American Pipe* is misplaced. *American Pipe* did not involve Rule 15(c) at all. The issue in that case was whether the filing of a class action tolled the statute of limitations. This Court held that it did because the class complaint provided defendant with notice of both the substantive claims and "generic identities of potential plaintiffs". However, the fact that notice of the substantive claims and the generic identity of potential plaintiffs was found by this Court in *American Pipe* to satisfy the statute of limitations does not support petitioner's argument that nothing else will. Second, even if its

(footnote continued on following page)

1. On Its Face, Rule 15(c) Supports the Seventh Circuit's Ruling.

Rule 15(c) provides,

> Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading.

Generally, when an amendment arises out of the same conduct as the original complaint, notice of the original litigation affords the defendant sufficient protection. But it does not always do so. And the case in which it may not is when a new defendant is added by amendment. The new defendant may well be unjustly surprised and prejudiced by its tardy inclusion in a lawsuit about which it had no prior knowledge. If the new defendant was unaware of the existence of a lawsuit, it may have misplaced evidence or lost touch with important witnesses. The fact that the amended complaint grew out of the same transaction or occurrence would be no protection to that defendant. Thus, the second sentence of Rule 15(c) includes two specific prerequisites to protect defendants by making sure that they had notice of the original complaint and were not prejudiced in preparing their defense. These prerequisites apply to amendments "changing the party *against* whom a claim is asserted" (emphasis added).

Essential to petitioner's position is a reading of Rule 15(c) that applies the second sentence equally to amendments adding plaintiffs. However, no court has ever held that the Rule applies equally to amendments adding plaintiffs. It is not surprising, therefore, that in support of its contention that "[i]t

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(footnote continued from previous page)

reliance on *American Pipe* is correct, the broad substantive allegations in the original complaint in this case afforded this defendant with sufficient notice of the "generic identity of all potential plaintiffs".

is . . . well established law in other circuits that all the criteria of Rule 15(c) must be satisfied where a new party is brought into a lawsuit", petitioner cites only cases that apply Rule 15(c) to amendments adding defendants. (See all cases cited in Petition, 9-10).

Indeed, the Advisory Committee explains that the Rule is not intended to be equally applicable to amendments changing plaintiffs. According to the Advisory Committee (39 F. R. D. at 83-84):

> The relation back of amendments changing plaintiffs is not expressly treated in revised Rule 15(c) since *the problem is generally easier.* Again, the chief consideration of policy is that of the statute of limitations, and the attitude taken in revised Rule 15(c) toward change of defendants *extends by analogy to amendments changing plaintiffs.* (Emphasis added.)

The relation back of amendments adding plaintiffs is easier because it does not pose the same dangers. If the amendment adding new plaintiffs arises out of the same occurrence it causes no unfair surprise. The defendant has notice of the lawsuit, indeed the defendant is already in court. Nor does an amendment adding plaintiffs present the problems of lost evidence, faded memories or absent witnesses. The defendant is already preparing to defend the action against him.

This is particularly so in Title VII cases. First, with the filing of the charge, a defendant knows that it could be sued on behalf of class members who had not satisfied any of Title VII's procedural prerequisites. *Franks* v. *Bowman Transp. Co., Inc.,* 424 U. S. 747, 771 (1976); *Albermarle Paper Co.* v. *Moody,* 422 U. S. 405, 418 n.8 (1975). Defendant also knows that the scope of the complaint could extend beyond the factual allegations of the charge, to encompass like and related kinds of discrimination that might reasonably have been within the scope of an EEOC investigation growing out of the charge. *Sanchez* v. *Standard Brands, Inc.,* 431 F.2d 455 (5th Cir. 1970).

Second, even if a Title VII suit was not brought as a class action, defendant knows that evidence of class-wide discrimination remains probative. *McDonnell Douglas Corp.* v. *Green*, 411 U. S. 792, 804-05 (1973). Indeed, defendant knows that even under Ms. Paskuly's original complaint, it would have had to defend against the same allegations of a broad pattern of discrimination against its female employees.

For these reasons, all of the protections intended by Rule 15(c) toward new defendants do not require a literal application of the Rule to amendments charging plaintiffs. Indeed, a literal application is impossible. For example, the problem of "mistaken identity" dealt with in the second sentence of the Rule can apply only to amendments adding Defendants.[5]

Thus, both the language of Rule 15(c) and the Advisory Committee's Notes interpreting the Rule support the Seventh

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[5] Petitioner's notice argument is another example of why the second sentence of Rule 15(c) cannot be applied literally. According to petitioner, Ms. Paskuly's timely complaint was not served by the Federal Marshal within the limitation period. Thus, relying on the literal language of the second sentence of Rule 15(c), petitioner claims that it did not have notice "within the period provided by law for commencing the action".

However, Rule 3, F. R. Civ. P., provides that "[a] civil action is commenced by filing a complaint with the court." And, according to Professor Moore, "the federal courts have consistently held that commencement of an action in compliance with Rule 3 is sufficient to toll a federal statute of limitations." 2 Moore's *Federal Practice* ¶ 3.07[5] at 3-122. See, *American Pipe and Construction Co.* v. *Utah*, 414 U. S. 538 (1974). See also, *Moore Company* v. *Sid Richardson Carbon & Gasoline Company*, 347 F. 2d 921 (8th Cir.), *cert. denied*, 383 U. S. 925 (1965); *Badillo* v. *Central Steel & Wire Co.*, 495 F. Supp. 299 (N. D. Ill. 1980). Thus, Ms. Paskuly's timely complaint tolled the statute of limitations. Defendant Marshall Field received timely notice regardless of when they were actually served. The cases petitioner cites involved amendments adding defendants and thus fall within the literal language of the Rule. See, *Appleton Elec.* v. *Graves Truck Line, Inc.*, 635 F.2d 603, 608 (7th Cir. 1980). See also, *Ingram* v. *Kumar*, 585 F.2d 566, 571 n. 10 (2d Cir. 1978); *United States* v. *Wahl*, 583 F.2d 285 (6th Cir. 1978); *Windbrooke Dev. Corp.* v. *Environment Entr., Inc.*, 524 F.2d 461 (5th Cir. 1975).

Circuit's holding that plaintiff's amendment adding the class allegations relates back because it arose from the same facts or occurrences as the original pleading.

2. The Treatises Support the Seventh Circuit's Ruling.

The treatises interpreting Rule 15(c) support the Seventh Circuit's application of the Rule. As Professors Wright and Miller explain, *Federal Practice and Procedure: Civil* § 1501 at 524:

> As long as defendant is fully apprised of a claim arising from specified conduct and has prepared to defend the action against him, his ability to protect himself will not be prejudicially affected if a new plaintiff is added, and he should not be permitted to invoke a limitations defense.

3. The Seventh Circuit's Ruling Is Consistent With the Case Law.

The case law is virtually uniform in its support of the Seventh Circuit's holding that an amendment adding new parties as plaintiffs relates back if it arises out of the same transaction or occurrence. See, *e.g.*, *Williams* v. *United States*, 405 F.2d 234, 237-39 (5th Cir. 1968); *Snoqualmie Tribe of Indians ex rel. Skykomish Tribe of Indians* v. *United States*, 372 F.2d 951, 961 (Ct. Cl. 1967); *Hockett* v. *American Airlines, Inc.*, 357 F. Supp. 1343, 1348 (N.D. Ill. 1973); *Bernstein* v. *National Liberty International Corp., supra; Badillo* v. *Central Steel & Wire Co., supra; Harshaw* v. *Pan American World Airlines, supra; Silverman* v. *Lehigh University, supra.* But see, *Perry* v. *Beneficial Finance Co., of New York, Inc.*, 81 F. R. D.

490 (W.D. N.Y. 1979). In fact, there are no Circuit Court opinions that are in conflict with any aspect of the Seventh Circuit's decision in this case.[6]

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[6] Petitioner's claim that the Seventh Circuit's holding that amendments adding class action allegations relate back under Rule 15(c) conflicts with the Second Circuit's decision in *Arneil* v. *Ramsey*, 550 F.2d 774 (1977) is mistaken.

The issue in *Arneil* was not whether a plaintiff could amend to add class allegations. Instead, the issue was whether the *Arneil* plaintiffs could bring an independent individual suit after the statute of limitations had expired. The convoluted background of the *Arneil* case is as follows: (1) Certain plaintiffs filed a class complaint. The class definition did not include the *Arneil* plaintiffs. (2) That complaint was then amended to enlarge the class, to include people like the *Arneil* plaintiffs. (3) Class certification was subsequently denied. (4) The *Arneil* plaintiffs later filed their independent action, after the statute of limitations had run. To avoid the time bar, they argued (a) that the filing of the amended class complaint tolled the statute of limitations for all class members, including themselves; and (b) that the date of the amended complaint should relate back to the date of the original class complaint. On these facts the *Arneil* court refused to award the *Arneil* plaintiffs the benefit of the extended tolling. In reaching this result, the Second Circuit gave special weight to the fact that the *Arneil* plaintiffs were attempting to bring a separate, independent action, rather than seeking to come into the original suit by way of intervention. 550 F.2d at 783. Given this background, *Arneil* is not in conflict with the Seventh Circuit's decision below.

CONCLUSION

For the reasons stated, the petition should be denied.

Respectfully submitted,

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